

)	
M.R., Appellant)	
)	
and)	Docket No. 21-0548
)	Issued: March 15, 2022
DEPARTMENT OF AGRICULTURE, FOREST)	
SERVICE, CARSON NATIONAL FOREST,)	
Taos, NM, Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

This case was previously before the Board on an unrelated issue.² The facts and circumstances as set forth in the Board's prior decision is incorporated herein by reference. The relevant facts are as follows.

¹ The Board notes that, following the August 19, 2020 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

² Docket No. 14-0549 (issued June 11, 2014).

low back strain, and left deltoid muscle tear. It paid appellant wage-loss compensation on the supplemental rolls effective December 26, 1987.

By decision dated March 13, 1996, OWCP issued a loss of wage-earning capacity (LWEC) determination based on appellant's ability to earn wages in the constructed position of food assembler, *Dictionary of Occupational Titles* (DOT) No. 319.484-010. The position had a light strength level and required the ability to push, pull or lift up to 10 pounds frequently, and up to 20 pounds occasionally. OWCP continued to pay appellant compensation based upon his wage-earning capacity on the periodic rolls effective March 31, 1996.

On May 5, 2015 appellant requested modification of the March 13, 1996 LWEC determination. By decision dated April 4, 2018, OWCP denied modification of its March 13, 1996 LWEC determination. It accorded the special weight of the medical opinion evidence to the February 13, 2017 report of Dr. Paul Saiz, a Board-certified orthopedic surgeon, who had conducted an impartial medical evaluation to resolve the conflict of medical opinion concerning appellant's work capacity. Dr. Saiz opined that appellant's medical condition had not worsened and that he remained capable of performing the duties of a food assembler.

On January 14, 2019 appellant requested reconsideration. By decision dated March 6, 2019, OWCP denied modification.

On August 4, 2020 appellant again requested reconsideration. Evidence of record following OWCP's March 6, 2019 decision included reports from Dr. Pamela Black, a Board-certified physiatrist, dated February 27, March 19, April 3 and 23, June 5, and August 6, 2019, which noted appellant's physical examination findings. Medical reports from Dr. Thomas Whalen, a Board-certified internist and anesthesiologist, were also received dated February 24, March 16, and April 15, 2020 which related appellant's physical examination findings and concluded that appellant was unable to return to work. In a May 1, 2020 report, Dr. Whalen noted her current symptoms and concluded that she was unable to return to work.

By decision dated August 19, 2020, OWCP summarily denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. The decision failed to mention or discuss the evidence received following its March 6, 2019 decision.

The Board, having duly considered the matter, concludes that the case is not in posture for decision.³

Modification of an LWEC determination is warranted if there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.⁴ The burden of proof is on the party seeking modification of the wage-earning capacity determination.⁵ Unlike

³ C.H., Docket No. 19-1114 (issued April 30, 2020); B.H., Docket No. 18-1515 (issued June 20, 2019); N.M., Docket No. 17-0262 (issued July 3, 2017).

⁴ 20 C.F.R. § 10.511; see *Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

⁵ *Id.* at § 10.511.

reconsideration pursuant to 5 U.S.C. § 8128(a), there is no time limitation for requesting modification of an LWEC determination.⁶ Requests for modification should be reviewed carefully to determine whether the claimant is seeking a reconsideration of a recently issued LWEC determination, as opposed to a modification of the LWEC determination.⁷

The Board finds that appellant's request for reconsideration was, in fact, a request for modification of the March 13, 1996 LWEC determination. Appellant set forth evidence that his restrictions had changed and that he was rendered totally disabled. It is well established that a claimant may establish that a modification of an LWEC determination is warranted if there has been a showing that there was, in fact, a material change in the nature and extent of his injury-related condition.⁸

The Board has held that when an LWEC determination has been issued and appellant submits evidence with respect to one of the criteria for modification OWCP must evaluate the evidence to determine if modification is warranted.⁹

As OWCP improperly summarily reviewed the case under the standard for an untimely reconsideration request, the case must be remanded to OWCP for a proper decision which includes findings of fact and a clear and precise statement regarding whether appellant has met his burden of proof to establish modification of his LWEC determination.¹⁰ Following any further development as deemed necessary, OWCP shall issue a *de novo* decision.

⁶ *J.J.*, Docket No. 21-0479 (issued November 29, 2021); *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

⁷ *Supra* note 4 at Chapter 2.1501.4a (June 2013).

⁸ *See L.M.*, Docket No. 20-1038 (issued March 10, 2021); *see also C.R.*, Docket No. 14-0111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

⁹ *See W.B.*, Docket No. 21-0272 (issued August 4, 2021); *L.P.*, Docket No. 18-1429 (March 8, 2019).

¹⁰ *See L.H.*, Docket No. 18-1787 (issued July 29, 2019); *R.Z.*, Docket No. 17-1455 (issued February 15, 2019).

IT IS HEREBY ORDERED THAT the August 19, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: March 15, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board